No. 76-835

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

NEW YORK TELEPHONE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 538 F. 2d 956. The opinion of the district court (Pet. App. E) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on July 13, 1976. A petition for rehearing with suggestion for rehearing *en banc* was denied on October 26, 1976 (Pet. Apps. C and D). The petition for a writ of certiorari was filed on December 20, 1976, and was granted on January 25, 1977 (App. 34). The jurisdiction of the Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, as part of its admittedly valid order authorizing the use of a pen register to investigate gambling offenses being committed by means of the telephone, a United States District Court may properly direct the telephone company to provide federal law enforcement agents the facilities and technical assistance necessary for implementation of the court's order.

STATUTES AND RULES INVOLVED

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. 2510–2520, provides in pertinent part:[1]

18 U.S.C. 2510.

As used in this chapter—

(1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

* * * * *

(4) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

* * * * *

[1] The entire text of Title III is set forth in the Appendix to Respondent's reply to our petition for certiorari, pp. 1a–25a.

(8) "contents", when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

* * * * *

The All Writs Act, 28 U.S.C. 1651(a) provides:

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

47 U.S.C. 201(a) provides, in pertinent part:

It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request there * * *.

Rule 41, Federal Rules of Criminal Procedure, provides in pertinent part:

(a) *Authority to Issue Warrant.* A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state court of record within the district wherein the property sought is located, upon request of a federal law enforcement officer or an attorney for the government.

(b) *Property Which May Be Seized With a Warrant.* A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits

of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense.

* * * * *

(h) *Scope and Definition.* This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers and any other tangible objects. The term "daytime" is used in this rule to mean the hours from 6:00 a.m. to 10:00 p.m. according to local time. The phrase "federal law enforcement officer" is used in this rule to mean any government agent, other than an attorney for the government as defined in Rule 54(c), who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the Attorney General to request the issuance of a search warrant.

Rule 57(b), Federal Rules of Criminal Procedure, provides:

> If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute.

New York Public Service Law, Section 91 (McKinney 1955) provides, in pertinent part:

> *Adequate service; just and reasonable charges; unjust discrimination; unreasonable preference*
>
> 1. Every telegraph corporation and every telephone corporation shall furnish and provide

> with respect to its business such instrumentalities and facilities as shall be adequate and in all respects just and reasonable. * * *

STATEMENT

On March 19, 1976, Judge Tenney of the United States District Court for the Southern District of New York issued an order authorizing FBI agents to install and use "pen registers" with respect to two telephones (App. 6–7). A pen register is a mechanical device that records the numbers dialed on a telephone (Pet. App. 1a–2a). In one version, the device operates by passing a narrow paper tape through a recording mechanism when the telephone receiver is removed from the hook. The recording mechanism consists of a pen that records on the paper tape the electrical impulses caused when the dial on the telephone is released.[2]

Pen registers must be attached, directly or indirectly, to the telephone line that services the subscriber's telephone. While most pen registers indicate the ringing of incoming calls, they do not identify the telephone number from which the calls originated (App. 15). None of the pen register devices[3] can

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[2] For example, if the numbers "345" were dialed, the pen register would record the following on the tape: "--- ---- -----." The dialed number is ascertained by counting the number of dashes in each group (App. 15). Although such pen registers are still in use, more modern versions of the devices automatically translate the dial impulses into numbers.

[3] Touch-tone decoders, which are similar to pen registers, are used for telephones having touch-tone dialing systems. Jones, *Electronic Eavesdropping Techniques and Equipment*, p. 31 (Law Enforcement Assistance Administration 1975).

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overhear oral communications and none can indicate whether outgoing calls are actually completed. Their only function is to provide a record of all numbers dialed from a particular telephone. Pen registers are manufactured mainly for telephone companies, which apparently use them to ensure the accuracy of billing to subscribers, to determine whether annoying calls to a subscriber are originating from a certain number and for other purposes.[4]

Judge Tenney issued his order of March 19, 1976, on the basis of an affidavit submitted on the same day by FBI Special Agent Smith (App. 1–5). This stated that certain individuals and unknown others were conducting an illegal gambling enterprise at 220 East 14th Street in New York and that two telephones bearing different numbers, which the affidavit listed, were being used at that address in the illegal activity (*id.* at 1). An investigation begun earlier, which included physical surveillance and a court-ordered wiretap, revealed that certain of these same individuals had been conducting an illegal gambling operation at another address in New York (*id.* at 1–3). A reliable informant notified the FBI that on March 16, 1976, this operation, which had been receiving an average of $19,000 per day in gambling wagers (*id.* at 2–4), had been moved to 220 East 14th

[4] Jones, *supra*, note 3; Note, *The Legal Constraints Upon the Use of the Pen Register As a Law Enforcement Tool*, 60 Cornell L. Rev. 1028, 1029 (1975); Claerhunt, *The Pen Register*, 20 Drake L. Rev. 108, 110–111 (1970); see also *United States* v. *Dote*, 371 F. 2d 176 (C.A. 7).

Street and was being conducted with one of the two telephone numbers mentioned above (p. 6, *supra*). The New York Telephone Company, which is a wholly-owned subsidiary of AT&T,[5] advised the FBI that this number and the other were subscribed to by "T. Hamilton" (*id.* at 4).

Judge Tenney found that there was probable cause to believe that an unlawful gambling enterprise using the facilities of interstate commerce, in violation of 18 U.S.C. 1952 and 371, was being conducted at the East 14th Street address and that the two telephones subscribed to by T. Hamilton at that address were being used in the commission of those offenses (*id.* at 6). He therefore ordered the New York Telephone Company to furnish the FBI "all information, facilities, and technical assistance" needed to install unobtrusively the pen registers, which the FBI would supply (App. 7).[6] The FBI was ordered to compensate the company at the prevailing rate for all facilities and technical assistance the company supplied (*ibid.*). The court's order further authorized the FBI to operate the devices with respect to the two telephones until knowledge of the numbers called led to the identity of the associates and confederates of

[5] Moody's *Public Utility Manual*, p. 1904 (1976).

[6] The only "technical assistance" required of the telephone company is the making of any connections needed to create the leased line running from the subscriber's line to a location where the pen register can be attached and observed. The FBI supplies its own pen register and connects it to the leased line; the physical connection between the leased line and the suspect's line is also accomplished by the FBI.

those known to be conducting the illegal operation, or for twenty days, "whichever is earlier" (*ibid.*).

In response to the court's order, the company informed the FBI of the location where the lines from the telephones emerged from the sealed telephone cables (App. 16).[7] In order to install a pen register, this information is needed, as is the identity of the specific pair of wires that constitute the telephone circuit of the subject line (*ibid.*).[8] The company also agreed to identify such "pairs" (*ibid.*).

In order to attach the pen register in an inconspicuous location, away from the building containing the telephones, it may be necessary to employ a "leased line," which is an unused telephone line that makes an "appearance" (see note 7, *supra*) in the same terminal box as the suspect's telephone line. Inside the box the leased line can be connected to the subject line and the pen register can then be installed on the leased line at a remote location and observed from that point (App. 16).

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[7] Such locations, which may be in such places as the basement of an apartment house, a telephone pole or the rear wall of a building, are commonly called "appearances" (App. 16).

[8] The company retains information regarding such "pairs" and "appearances" in its normal business records and routinely discloses it to the government in response to subpoena or court order. 2 Hearings of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance, p. 1569 (1976) (testimony of H. W. William Caming, attorney, American Telephone & Telegraph Company). The National Wiretap Commission (NWC), as it is commonly known, was established by Congress to study and review the operation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

In this case, however, the company refused to lease lines to the FBI, although the company interpreted the court's order to require it to do so (App. 16–17). Instead, the company "advised that the FBI should string cables from the subject apartment to another location [where] a pen register device can be installed" (App. 18).

In order to determine whether the investigation could be conducted without leased lines, FBI agents canvassed the neighborhood for four days in an attempt to find a location where it could string its own wires and attach the pen registers without alerting the suspects. However, because of the location of the apartment and because the suspects were known to use counter-surveillance techniques (App. 21), the FBI determined that "if men were observed stringing lines and cables from the subject apartment to another location, the gambling operation would cease to function" (App. 18). Leased lines were therefore essential.

On March 30, 1976, the telephone company moved the district court to vacate that portion of the pen register order directing it to furnish facilities and technical assistance to the FBI (App. 8). Although not directly challenging the government's authority to use a pen register (Pet. App. 31a), the Company claimed that it could be directed to provide the FBI with a leased line only in connection with a wiretap order issued under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (18

U.S.C. 2510–2520) (Pet. App. 35a). The district court rejected this argument, pointing out that Title III regulates wire interceptions and not pen registers (*id.* at 32a–36a). Agreeing with the decision in *United States* v. *Illinois Bell Tel. Co.*, 531 F. 2d 809 (C.A. 7), the court concluded that it had authority to compel the telephone company to provide facilities and technical assistance to facilitate installation of a pen register (Pet. App. 37a–39a).

On April 9, 1976, after the district court and the court of appeals refused the telephone company's motions to stay the pen register order pending appeal of the denial of the motion to vacate (App. 24, 32), the company provided leased lines. On the same date, District Judge Lasker extended Judge Tenney's order of March 19 for an additional twenty days (App. 33).[9]

[9] Thus, the pen register investigation had been completed by the time of the court of appeals' decision in this case (July 13, 1976) and neither that decision nor a decision by this Court could affect this particular investigation. Nevertheless, this fact does not render the case moot, because the controversy here is one "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498, 515. The mootness question is discussed in our petition (pp. 6, n. 6, 17–20), upon which we rely. We add only that the telephone company has taken a stance that renders inevitable the recurrence of the questions in this case. On April 30, 1975, AT&T communicated "to all Bell System security managers and also security counsel * * * the recommendation that private-line [leased line] facilities not be furnished to federal law enforcement authorities acting under non-Title III court orders, for use in connection with a court-authorized pen register." Testimony of H. W. William Caming, Attorney, AT&T, 2 NWC Hearings, *supra*, at 1569.

The court of appeals affirmed in part and reversed in part, with one judge dissenting on the ground that the order below should be affirmed in its entirety (Pet. App. 1a–24a). The court agreed that pen registers do not fall within the scope of Title III and are not otherwise prohibited or regulated by statute. Relying in part on *United States* v. *Giordano,* 416 U.S. 505, 553–554 (Mr. Justice Powell, concurring in part and dissenting in part), the court further agreed that district courts have the power—either inherently or under Rule 41, Fed. R. Crim. P.—to authorize pen register surveillance. Because the order here was issued upon an adequate showing of probable cause, the court concluded that the district judge had properly authorized the FBI to install and use the devices (Pet. App. 3a–8a).

The majority held, however, that the district court abused its discretion in ordering respondent to lease lines to the FBI for installing the pen registers.[10] The majority assumed *arguendo* "that a district court has inherent discretionary authority or discretionary power under the All Writs Act to compel technical assistance by the Telephone Company"; but "in the

[10] Although the decision below is phrased in terms of an abuse of discretion by the lower court, the basis for that finding does not lie in any particular facts of this case—indeed, the opinion specifically recognizes that the facts here strongly support the exercise of discretion. Instead, the majority in substance concluded that it will always be an abuse of judicial discretion to require the telephone company to provide a leased line for the installation of a pen register, so long as there is no statute expressly authorizing such assistance.

absence of specific and properly limited Congressional action, it was an abuse of discretion" for the district court to order the company to provide facilities or assistance (*id.* at 13a).

Although reaching this conclusion, the majority recognized (*id.* at 13a–14a):

> Federal law enforcement agents simply cannot implement pen register surveillance without the Telephone Company's help. The assistance requested required no extraordinary expenditure of time or effort by [respondent]; indeed, as we understand it, providing lease or private lines is a relatively simple, routine procedure. Moreover, as we have noted above, we believe that the Telephone Company can provide this technical assistance without fear of civil or criminal liability; and the order itself provides for financial compensation for [respondent] for the assistance it renders. An additional argument in favor of granting the Government's request is its legitimate concern that if the courts do not act to compel compliance, law enforcement in general, and the particular investigation involved here, may be severely hampered.

On the other hand, the majority believed that issuance of "such an order could establish a most undesirable, if not dangerous and unwise precedent for the authority of federal courts to impress unwilling aid on private third parties" (*id.* at 15a). On this basis, and the court's further concern that "there is no assurance that the court will always be able to protect * * * third parties from excessive or overzealous Government activity or compulsion," the court majority concluded

that Congress was better equipped than the judiciary to decide the circumstances under which the telephone company should be required to render assistance and facilities necessary for implementation of a pen register order (*id.* at 15a–16a).

In dissent, Judge Mansfield agreed with the majority's assumption that the district court possessed the power to require respondent to assist in implementing the order, but disagreed that such orders constitute an abuse of discretion in the absence of explicit statutory authorization. "[S]ince the terms, conditions and limits of such assistance would vary according to the circumstances of each particular case, the subject is better suited to judicial exercise of discretion under the All Writs Act than to a precise or detailed statutory blueprint" (Pet. App. 24a). In Judge Mansfield's view, district courts could be trusted to use their powers only when necesary and the instant case was one in which the lower court appropriately ordered the telephone company's assistance (*id.* at 22a–23a).[11]

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[11] Two courts of appeals have ruled on the question in this case favorably to the government. *United States* v. *Southwestern Bell Telephone Company*, 546 F. 2d 243 (C.A. 8), petition for a writ of certiorari pending, No. 76–1157; *United States* v. *Illinois Bell Tel. Co.*, 531 F. 2d 809 (C.A. 7). The question is presently pending in the Sixth Circuit. *Ohio Bell Telephone Company* v. *United States*, No. 76–2627. The Fifth Circuit has dismissed one such case as moot (*Southern Bell Tel. & Tel. Co.* v. *United States*, 541 F. 2d 1151), and has a second case pending (*In re Application*, No. 76–4117) that is probably also moot under the rationale of *Southern Bell* because the individual under investigation has been arrested.

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SUMMARY OF ARGUMENT

Although respondent contends (Reply to Pet. 12–19) that pen register orders are governed by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. 2510–2520, it did not file a cross-petition for a writ of certiorari from the contrary holding below. Nevertheless, we do not believe that such a petition was required in the circumstances of this case, and we agree that the issue warrants review because it is so intimately related to the question set forth in the petition—whether the district court properly required the telephone company to furnish technical assistance necessary for the installation of the pen registers.

The language of Title III and its legislative history clearly indicate that Congress intended to permit the use of pen register surveillance as a normal investigatory technique free of the restrictions on the interception of oral communications contained in Title III. All courts of appeals to consider this issue have so held.

The order authorizing the use of the pen registers satisfied the Fourth Amendment, and thus was properly issued under Rule 41, Fed. R. Crim. P., governing the granting of search warrants. Since without the telephone company's assistance in installing the pen registers, that order would have no effect, the district court had power pursuant to the All Writs Act, 28 U.S.C. 1651(a), to require the necessary assistance.

Respondent is a public utility, under an obligation to provide its services on reasonable request. The

order here was issued on the basis of an undisputed finding of probable cause. It required the company to provide routine services, for which it was paid at prevailing rates, in order to investigate crimes being committed through the use of telephone company facilities. The district court's order was thus entirely reasonable and "agreeable to the usages and principles of law." 28 U.S.C. 1651(a).

The district court did not abuse its discretion in issuing the order in the absence of specific statutory authorization. Congress has already provided strict sanctions against the unauthorized use of wiretaps, and those sanctions would deter the transformation of the authorized pen register surveillance into an unauthorized wiretap. Since the necessity for an order requiring the telephone company to assist in installing a pen register and the proper terms of such an order turn on the facts of the particular case, the matter is appropriately one for the exercise of judicial discretion, rather than statutory authorization. But even if statutory treatment were preferable, there would be no reason for a court to refuse to act in an appropriate case in the absence of a statute. Finally, the amendment of Title III to include a specific provision authorizing orders requiring telephone company assistance in installing wiretaps does not indicate that a similar statutory provision is necessary before a court may require the telephone company to assist in installing pen registers, which are governed by no similarly comprehensive legislative scheme.

ARGUMENT

I

THE ORDER AUTHORIZING THE USE OF THE PEN REGISTERS WAS PROPERLY ISSUED

A. THIS ISSUE WARRANTS REVIEW IN THIS CASE

In its Reply (pp. 12–19) to our certiorari petition, respondent argued that pen register orders are governed by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. 2510–2520. In the district court, however, respondent apparently conceded that Title III did not apply (Pet. App. 33a, 35a). The court of appeals, noting respondent's agreement "that pen register orders are not covered by Title III" (Pet. App. 4a, 6a),[12] held that Title III does not apply to pen registers[13] (Pet. App. 3a–8a); accordingly, the court's judgment (Pet. App. 25a–26a) affirmed this aspect of the district court's decision. Although respondent apparently now wishes to argue that this portion of the court of appeals' judgment should be reversed, it did not file a cross-petition for a writ of certiorari.

In these circumstances, there is some doubt whether respondent is entitled to challenge the decision of the

[12] Respondent's brief in the court of appeals is less clear on the point.

[13] Every court of appeals that has considered the matter agrees. *United States* v. *Southwestern Bell Telephone Company*, *supra*; *United States v. Illinois Bell Tel. Co.*, *supra*.

court below on the Title III issue.[14] See *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 381, n. 4; *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, 431–432. As one commentator has put it, "*Mills* and *Express Publishing* both appear to hold that when the logical result of acceptance of a respondent's additional argument would be to change more of the judgment than is brought into issue by the initial appeal, a cross-petition must be filed even though the respondent is not asking that the judgment be altered but is content that it be affirmed." Stern, *When to Cross-Appeal or Cross-Petition—Certainty or Confusion?*, 87 Harv. L. Rev. 763, 772 (1974); see also *Strunk* v. *United States*, 412 U.S. 434, 437; *National Labor Relations Board* v. *International Van Lines*, 409 U.S. 48, 52, n. 4.

We do not believe, however, that the requirement of a cross-petition in these circumstances is a rigid rule. "[A] party satisfied with a judgment"—as the telephone company was in this case—"should not have to appeal from it in order to defend it on any ground

[14] The issue whether pen register orders are governed by Title III is not fairly comprehended in the question presented in our petition (Pet. 2). It would be unusual indeed for a petitioner to seek review of the portion of the judgment in petitioner's favor and we did not intend to do so here. In light of respondent's position below, our question presented refers to an "admittedly valid order" authorizing the FBI to install a pen register (Pet. 2) and we discussed only the authority of the district court to order the company to furnish leased lines (Pet. 9–20).

which the record and the law permit." Stern, *supra,* 87 Harv. at 774. This, of course, is the general rule. See *Langnes* v. *Green,* 282 U.S. 531; *Dandridge* v. *Williams,* 397 U.S. 471, 475–476, n. 6. If the federal government, as a potential respondent, were required to review all judgments of the courts of appeals that it found satisfactory to determine whether it should nevertheless file a cross-petition because the losing side might file a petition that could be granted, the burden would be considerable both to the government and the Court.[15]

We submit, instead, that the Court, when it has jurisdiction of a case on certiorari, also has discretion to decide an issue urged upon it by a non-petitioning respondent if the issue is otherwise worthy of the Court's consideration—even though acceptance of the respondent's arguments would require reversal of part of the judgment but not the ultimate result of the decision below. That, we believe, is the rule laid down in *United States* v. *ITT Continental Baking Co.,* 420 U.S. 223, 226–227, n. 2.

Because, in our view, respondent's argument that pen register orders are governed by Title III has little force and because no court of appeals has accepted it, we would oppose certiorari if only this issue were presented. However, we believe the issue warrants review in this case because it is so intimately related to the ultimate controversy regarding the district court's power to order the company to furnish technical assistance. We therefore address respondent's arguments on the Title III question.

[15] See Stern, *supra,* 87 Harv. L. Rev. at 775–776.

B. TITLE III DOES NOT GOVERN THE AUTHORIZATION OF THE USE OF A PEN REGISTER

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. 2510–2520, sets forth the procedure the government must follow in securing judicial authority to intercept wire communications in the investigation of serious offenses. It is common ground that in this case the FBI's application for a pen register order, which the district court granted, did not follow the procedures of Title III. In our view, however, this was not necessary. For we agree with Mr. Justice Powell that the "installation of a pen register device to monitor and record the numbers dialed from a particular telephone line is not governed by Title III." *United States* v. *Giordano, supra,* 416 U.S. at 553.[16]

The procedures of Title III apply only to orders "authorizing or approving the *interception* of a wire or oral communication * * *." 18 U.S.C. 2518(1) (emphasis added). Congress defined "intercept" to mean "the *aural* acquisition of the *contents* of any wire or oral communication through the use of any electronic, mechanical, or other device." 18 U.S.C. 2510 (4) (emphasis added).

[16] The Court majority in *Giordano* did not reach the issue, it suppressed evidence derived from the pen register because this evidence was in turn derived from an invalid wiretap. 416 U.S. at 533–534, n. 19.

Pen registers are not covered by Title III for the quite apparent reason that they do not involve the aural acquisition of the contents of any communication. Pen registers decode outgoing telephone numbers by responding to changes in electrical voltage caused by the turning of the dial on the telephone; the information is presented in a form to be interpreted by sight, not by hearing, as is the case in an "aural" acquisition.

Moreover, the content of the telephone call—the communication—is not recorded by the pen register. Pen registers disclose only the telephone numbers that have been dialed; they do not disclose the existence of any communication between any specific users of the two telephones or even whether the call was completed.[17] Rather than reporting the existence of communications, pen registers record only the act of dialing—an effort to establish a communication. Pen registers do not intrude upon the spoken word.[18] The pen register reveals nothing more than what has been voluntarily disclosed to the telephone company—in-

[17] It has been suggested that the ringing of the telephone whose number has been dialed may constitute a communication (*United States* v. *Caplan*, 255 F. Supp. 805, 808 (E.D. Mich.)), but the pen register does not disclose whether that telephone is ringing; the number may be busy.

[18] The act of dialing might be characterized as a communication to the telephone company; it is a request to provide service. But that is not the type of communication Congress intended to protect. S. Rep. No. 1097, 90th Cong., 2d Sess., p. 90 (1968). See Note, *The Legal Constraints Upon the Use of the Pen Register as a Law Enforcement Tool*, 60 Cornell L. Rev. 1028, 1039–1042 (1975).

formation similar to that used in compiling telephone toll or message unit billing records."[19] Cf. *United States* v. *Miller*, 425 U.S. 435, 442–443.

The legislative history could not be clearer on this point. The Senate Report explained that the definition of intercept was designed to limit the scope of the Act to aural acquisitions of the contents of wire or oral communications: "Other forms of surveillance are not within the proposed legislation. * * * The proposed legislation is not designed to prevent the tracing of phone calls. *The use of a 'pen register,' for example, would be permissible.* But see *United States* v. *Dote*, 371 F. 2d 176 (7th Cir. 1966). The proposed legislation is intended to protect the privacy of the communication itself and not the means of communication" (S. Rep. No. 1097, *supra*, at 90) (emphasis added).[20]

[19] Such records are excluded from Title III. S. Rep. No. 1097, *supra*, at 90; *United States* v. *Gallo*, 123 F. 2d 229, 231 (C.A. 2).

[20] Respondent seeks to avoid the force of this language by postulating that Congress referred to *Dote* because it wanted to allow the telephone companies to continue to use pen registers in the ordinary course of their business, "as long as they did not become an arm of law enforcement outside the provisions of Title III, as in the *Dote* case" (Reply to Pet. 18). But Congress could scarcely have sought to make that point in such a cryptic manner, particularly in light of the specific provision in 18 U.S.C. 2511(2)(a)(i) that excludes from the prohibitions of the Act all normal telephone company business practices. Rather, the "But see" cite was evidently intended to indicate here, as it did elsewhere in the Report, cases that would be overruled by the proposed legislation. See S. Rep. No. 1097, *supra*, at 100, 108.

Pen registers thus do not present the problems with which Congress was concerned in Title III and Congress acted on the firm belief that the new legislation would not affect the continued use of these devices in the investigation of criminal activities.[21] The court below correctly concluded (Pet. App. 3a–8a), as did the other courts of appeals that have passed on the issue,[22] that pen register orders are not subject to the requirements of Title III.[23]

[21] In Section 803 of Title III, 82 Stat. 223, Congress also amended Section 605 of the Communications Act of 1934, 48 Stat. 1103, 47 U.S.C. 605, which had prohibited the interception and divulgence of "any communication" by wire or radio. A court of appeals had held this prohibited a telephone company from releasing the results of its pen register investigation to the government. *United States* v. *Dote*, *supra*. Congress in effect overruled *Dote* by limiting Section 605 of the Communications Act to the interception of "any radio communication." See *Korman* v. *United States*, 486 F. 2d 926, 931–932 (C.A. 7).

[22] See p. 16, *supra*.

[23] Contrary to respondent's suggestion (Reply to Pet. 14), this conclusion significantly facilitates criminal investigations. Congress has permitted federal wire interceptions to be used to investigate only certain specified criminal offenses (18 U.S.C. 2516(1)). Pen registers may be useful in the investigation of other crimes—*e.g.*, fugitive offenses, 18 U.S.C. 1071 *et seq.*; escape, 18 U.S.C. 751; fraud offenses, 18 U.S.C. 1341 *et seq.*; firearms offenses, 922, 18 U.S.C. App. 1202; civil rights offenses, 18 U.S.C. 241 *et seq.*, and tax offenses, *e.g.*, 26 U.S.C. 7201 *et seq.*, 7262, 7272, See, *e.g.*, *United States* v. *Illinois Bell Tel. Co.*, *supra*, 531 F. 2d at 811.

Even when the crime under investigation is one identified in Title III, the use of a pen register before seeking authority to intercept conversations may often be desirable to verify the need for a Title III interception and corroborate the probable cause that must be shown in the application for the authorizing order. This verification process may also, of course, indicate that there is no probable cause for the interception, and thus protect the privacy of innocent persons suspected of crimes.

The use of Title III procedures to obtain authorizations for the use of pen registers would substantially increase the administrative burden of law enforcement officers, in a way detrimental to a fast breaking criminal investigation. Wire interception applications go through "some six stages of review from the U.S. Attorney or local Federal Strike Force through the central offices of the Attorney General in Washington." *Electronic Surveillance*, Report of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance, p. 7 (1976). They also require the personal consideration of the Attorney General or an Assistant Attorney General. See *United States* v. *Giordano*, *supra*.

[24] Federal judges are considered federal magistrates under the Rules. Rule 54(c), Fed. R. Crim. P.

II

THE ORDER REQUIRING RESPONDENT TO ASSIST IN INSTALLING THE PEN REGISTERS WAS PROPERLY ISSUED

It is undisputed that the warrant in this case satisfied the Fourth Amendment, which Mr. Justice Powell believed to be the sole constraint upon the government's use of pen registers. *United States* v. *Giordano, supra,* 416 U.S. at 553–554. The authority of district judges to issue pen register orders is contained in Rule 41, Fed. R. Crim. P., which governs the granting of search warrants. The courts below were in agreement that Rule 41 applied (Pet. App. 6a–8a, 37a–38a).

The only possible doubt on this score stems from the clause in Rule 41(b) empowering federal magistrates[24] to issue warrants authorizing a search for and seizure of any "property that constitutes evidence of the commission of a criminal offense" and

Rule 41(h) defining property "to include documents, books, papers and any other tangible objects." That "property" includes tangible items does not, however, lead to the conclusion that it excludes intangible items, such as dial impulses recorded by a pen register.[25] The Court stated as much in *Katz* v. *United States*, 389 U.S. 347, 355–356, and *Osborn* v. *United States*, 385 U.S. 323, 329–330, by holding in *Osborn* and indicating in *Katz* that valid federal warrants could be obtained to search for and seize intangible objects—in those cases, oral communications.[26] Rule 41 does not itself restrict the objects of searches; it is

[25] When the framers of Rule 41 intended a definition to be all inclusive they introduced it with the phrase "to mean." See *Helvering* v. *Morgan's, Inc.*, 293 U.S. 121, 125, n. 1. Thus, Rule 41(h) provides (emphasis added): "This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term 'property' is used in this rule *to include* documents, books, papers and any other tangible objects. The term 'daytime' is used in this rule *to mean* the hours from 6:00 a.m. to 10:00 p.m. according to local time. The phrase 'federal law enforcement officer' is used in this rule *to mean* any government agent, other than an attorney for the government as defined in Rule 54(c), who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the Attorney General to request the issuance of a search warrant."

[26] In *Katz* v. *United States*, *supra*, 389 U.S. at 356, n. 16, the Court stated that the notice requirement in Rule 41(d) was not so inflexible that notice always had to be given before the search commenced. For similar reasons, the requirement in Rule 41(c)(1) that the search be conducted within 10 days of the issuance of the warrant is not so rigid as to mean that a pen register surveillance can continue for 10 days and no longer. Whether the device must be installed within 10 days of the order is not at issue in this case.

congruent with the Fourth Amendment, allowing warrants to issue with respect to intangible as well as tangible items that are proper subjects of a search. Dial impulses are within that category.[27]

This brings us to the ultimate issue in the case: whether the district court properly ordered the telephone company to provide the FBI with the necessary leased lines. Without this assistance, the court's warrant authorizing the FBI to install and use a pen registers would have had no effect despite its validity under the Fourth Amendment and the Federal Rules of Criminal Procedure (Pet. App. 13a–14a). In this situation, the district court had authority under the All Writs Act, 28 U.S.C. 1651(a),[28] to require respondent to provide the necessary facilities for installation of the pen registers. Accord, *United States* v. *Southwestern Bell Telephone Co., supra*, 546 F. 2d at 246, n. 7; *United States* v. *Illinois Bell Tel. Co.*, 531 F. 2d 809, 814; cf. *Stern* v. *South Chester Tube Co.*, 490 U.S. 606, 609–610; *Board of Commissioners of Knox County* v. *Aspinwall*, 24 How. 376, 383–385; *Weber* v. *Lee County*, 6 Wall. 210; *Clark Equipment Co.* v. *Armstrong Equipment Co.*, 431 F. 2d 54 (C.A. 5),

[27] Since we believe that Rule 41 is broad enough to authorize a warrant permitting the installation of a pen register, we do not discuss whether the Fourth Amendment itself could serve as a basis for issuance of the warrant in this case. Cf. *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388; Rule 57(b), Fed. R. Crim. P.

[28] The All Writs Act provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

certiorari denied, 402 U.S. 909; and cases cited at Pet. App. 18a–19a (dissenting opinion) Such an order implements the Rule 41 warrant. See *Rea* v. *United States,* 350 U.S. 214, 217–218; *id.* at 219 (dissenting opinion).[29]

It is important to recognize that respondent is no ordinary third party. It is a corporation acting as public utility and the "primary duty of a public utility is to serve on reasonable terms all those who desire the service it renders." *United Gas Co.* v. *R.R. Comm'n.,* 278 U.S. 300, 309; *Western Union Tel. Co.* v. *Call Pub. Co.,* 181 U.S. 92, 99–100. The government desired the company's service in the form of leased lines; as a communications carrier, the telephone company had an obligation under either federal or state [30] law to furnish "service upon reasonable request therefor." 47 U.S.C. 201(a).[31]

The company was not at liberty to refuse to provide the leased lines and thereby itself decide whether the FBI's investigation should cease or proceed in another manner. The district court had issued a warrant, supported by probable cause, authorizing the use of

[29] Contrary to respondent's suggestion (Reply to Pet. 10–11), we do not rely on the All Writs Act as an independent jurisdictional basis for the district court's order. That basis is provided by Rule 41, Fed. R. Crim. P., on which the order authorizing the installation of the pen registers rests. The order to the telephone company, necessary to effectuate the underlying order, rests on the All Writs Act, which thus performs its traditional function of authorizing implementing orders.

[30] New York Public Service Law, Section 91 (McKinney 1955).

[31] The carrier's failure to fulfill its federal obligation may subject it to civil (47 U.S.C. 406) and criminal (47 U.S.C. 202, 501) sanctions.

the pen registers. The order accompanying the warrant and necessary to its implementation did not require the company to furnish any unusual or burdensome services. The court majority recognized that "providing lease or private lines is a relatively simple, routine procedure" (Pet. App. 13a). Nor was respondent directed to undertake this service free-of-charge; the judge's order provided that it would be reimbursed at the prevailing rates. On all counts, the district court's order was reasonable and, in the language of the All Writs Act, "agreeable to the usages and principles of law." 28 U.S.C. 1651(a).[32]

Furthermore, respondent had a special obligation to provide leased lines in this case. The telephone company was far from an innocent bystander pressed into burdensome service for the common good. There was probable cause, the district judge found, to believe that the telephone company's facilities were being used in the commission of federal criminal offenses.[33] Viewed in this light, the district court's order merely required the company to lease lines for the investigation of crimes being committed through the use of the company's telephone lines.

[32] The company's compliance with the court's order would not have subjected it to any civil or criminal liability. Pet. App. 9a; *United States* v. *Southwestern Bell Telephone Co.*, *supra*, 546 F. 2d at 246, n. 6; *United States* v. *Illinois Bell Tel. Co.*, *supra*, 531 F. 2d at 814–815.

[33] It is no part of a communication carrier's public duty to supply service to subscribers who wish to use their telephones for unlawful purposes. Respondent and its parent company recognize as much. New York Tel. Co., Public Service Comm'n. Tariff No. 800, Section H.5 (July 14, 1973); AT&T Tariff F.C.C. No. 263, Section 2.2.3 (January 1, 1969).

It is no answer to say, as did the court of appeals majority, that sustaining the district court's order could serve as a "dangerous and unwise precedent for the authority of federal courts to impress unwilling aid on private third parties" (Pet. App. 15a). The court of appeals was bound to rule on the case before it, not on some hypothetical future case. It was required to decide only whether the district court could properly order the telephone company, not some other private individual, to provide the assistance necessary for the execution of a valid warrant—a warrant supported by probable cause to believe that the company's facilities were being employed in a criminal venture. Analysis of that issue, we submit, leads to the conclusion that the district court had such power and that it properly exercised it in this case.

The court majority's apparent fear that agents might abuse the authority to install pen registers is unfounded and lends no support to its decision regarding the order to the telephone company (Pet. App. 15a–16a). Respondent, expressing the same concern, states that "once a modern pen register has been installed, wiretap interception of telephone conversations may be accomplished simply by plugging in headphones or a tape recorder to the appropriate terminal on the pen register unit" (Reply to Pet. 13).[34]

[34] It is true that when a pen register is attached to a subscriber's line, the same physical connection can be used to attach other equipment that can intercept oral communications. But agents who conduct pen register investigations are instructed that any monitoring of wires is unlawful and should not be attempted.

Some pen registers have jacks, as respondent notes, that permit the attachment of other equipment sensitive to voices; without such equipment, however, the monitoring of conversations is impossible and agents are not issued the additional equipment. Moreover, when possible, any jacks are disabled from the inside before the pen registers are installed.

If the telephone company believes these precautions and the criminal and civil sanctions discussed in the text are insufficient, it could offer to have the pen registers installed and monitored by the agents at the telephone company central exchange, where the opportunity to use unauthorized equipment would be extremely limited. Or the telephone company itself could attach a pen register to the subject telephone lines and then transmit the dial impulses over a leased line to the monitoring agents. In this situation an agent would not have the ability to monitor conversations even if he had the desire, because he would not have direct access to the telephone lines of the suspect. Or the telephone company could operate the pen register itself, providing the government with the results. See *United States* v. *Dote*, 371 F. 2d 176 (C.A. 7). The use of any of these alternatives would eliminate the "inherent capability of abuse" of pen registers (Reply to Pet. 13, 19).

All this entirely ignores that a pen register warrant authorizes, as did the warrant here (App. 6–7), only the installation and use of a pen register and that Congress has already legislated to prevent precisely the kind of abuse envisioned by the court majority and respondent. Under Title III of the Omnibus Crime Control Act and Safe Streets Act of 1968, if a federal agent—or any other law enforcement officer—engaged in unauthorized wiretapping by plugging into a pen register as respondent suggests, he would be subject to severe criminal sanctions[35] and

[35] See 18 U.S.C. 2511(1), which provides that any person who willfully intercepts any wire communications without court authorization pursuant to Title III shall be fined not more than $10,000 or imprisoned not more than five years, or both.

[36] See 18 U.S.C. 2520, which provides that any person whose wire or oral communication has been intercepted in violation of Title III shall be entitled to recover from the violator actual damages not less than $100 per day for each day of violation, punitive damages, attorney's fees and litigation costs.

civil liability.[36] To speculate that despite these sanctions violations might occur, and to transform this speculation into a basis for a court's withholding authorization, is to argue against the issuance of search warrants of any sort. One might as well say, for example, that a court should not grant a warrant to search for a pistol in a suspected murderer's apartment because the officers might conduct a general search for other items in violation of the Fourth Amendment.

Nor is there substance in the court majority's further point, in support of its reversal of the order against the telephone company, that if the government "requires technical assistance, it is far better to have the authority for ordering that assistance clearly defined by statute" (Pet. App. 16a). This fails to recognize the quite obvious fact that Congress can legislate even if the courts issue orders such as the one involved in this case; the courts' actions would in no way bar Congress from entering the area if this were thought appropriate.

Moreover, it is far from certain that the legislative branch is better suited than the judicial to the task of deciding when and under what circumstances a telephone company may be ordered to provide the assistance needed to install a pen register or any other type of assistance. The Senate Report on Title III, quoted at p. 21, *supra,* indicates that Congress apparently assumed that legislation to govern pen registers was not required. And, as Judge Mansfield pointed out in dissent (Pet. App. 24a) "since the terms, conditions and limits of such assistance would vary according to the

circumstances of each particular case, the subject is better suited to judicial exercise of discretion under the All Writs Act than to a precise or detailed statutory blueprint." Indeed, when Congress provided explicit authority for judicial orders requiring telephone company assistance in installing wiretaps, Congress did not limit that authorization by any such statutory blueprint.[37]

All that remains is the court's discussion of the fact that Congress amended Title III in 1970 to require common carriers to give technical assistance in connection with wiretaps and other interceptions covered by Title III. To the court majority (but not to the dissenting judge (Pet. App. 21a–22a)), this illustrated a congressional "doubt that the courts possessed inherent power to issue such orders" and therefore "it seems reasonable to conclude that similar authorization should be required in connection with pen register orders" (Pet. App. 15a). The argument fails not only because the premise is incorrect but also because the conclusion would in any event not follow.

In *Application of the United States,* 427 F. 2d 639 (C.A. 9), the district court had refused the government's request for an order directing the telephone company to provide assistance in conducting a court-

[37] See 18 U.S.C. 2518(4), which provides in pertinent part that "[a]n order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier * * * shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively * * *."

authorized wiretap. The court of appeals held that since Title III is a "comprehensive legislative treatment" of wiretapping, and in "view of the breadth and apparent self-sufficiency of this general statute, and the total absence of any provision even hinting that the court is to have authority to enter such a unique order as the Government here seeks," it would not infer that authority from the Act. *Id.* at 643. The court stated, "[f]or all that the Act and its legislative history disclose, Congress meant to limit approved interceptions to those which could be accomplished without the active assistance of the carrier, or at least to those in which that assistance would be forthcoming on a voluntary basis." *Id.* at 644.

As a result, Congress promptly amended Title III to provide that wire intercept orders should, at the government's request, include a provision requiring the assistance of "a communication common carrier, * * *." 84 Stat. 654, 18 U.S.C. 2518(4).[38] The legislative history of this amendment reveals that Congress was only resolving any possible ambiguity in the statute in order to make clear what had previously been implicit in Title III. See, *e.g.*, 115 Cong. Rec. 37192 (1969) (Senator McClellan); 115 Cong. Rec. 37193 (1969) (Senator Tydings, who had been instrumental in the enactment of Title III).[39] Congress' action was not an acceptance of the Ninth Circuit's views, but

[38] The amendment also provided that reliance on a court order would constitute a defense to any civil or criminal action (18 U.S.C. 2520) and that it was not unlawful for a communication common carrier to provide such assistance. 18 U.S.C. 2511(2)(a)(ii).

rather "more in the nature of an overruling of that opinion." *United States* v. *Illinois Bell Tel. Co., supra,* 531 F. 2d at 813. See also *United States* v. *Southwestern Bell Telephone Co., supra,* 546 F. 2d at 246.

In any event, even if Congress' action constituted a ratification of the Ninth Circuit's views, it would not follow that such explicit statutory authorization is needed for the order issued to the telephone company here. The basis for the conclusion that such statutory authorization was necessary in regard to wiretaps was the existence of a comprehensive statutory scheme covering all other aspects of wire interceptions. No similar statutory scheme exists for pen registers. Accordingly, there can be no similar objection to a court's issuing an order to the telephone company so that the pen register warrant can be implemented.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed insofar as it reversed

[39] The proposed electronic surveillance statute discussed in the President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Organized Crime*, Appendix C (1967)) upon which Title III was based (see *United States* v. *Giordano, supra*, 416 U.S. at 517–518, n. 7), contemplated that the telephone company had a duty to assist law enforcement agencies in installing wire taps (*id.* at 104). Nothing in the original Title III indicates that its drafters rejected this idea; instead, the legislative history noted above suggests that they simply believed an explicit statement of this obligation unnecessary.

the district court's order directing the telephone company to provide assistance. In all other respects, the judgment should be affirmed.

Respectfully submitted.

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